No. _____

In The

Supreme Court of the United States

LAMAR JONES BEY

Petitioner,

v.

KELLY JOHNSON
AND WAYNE TRIERWEILER

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As the divided panel recognized below, this case squarely presents a question that has deeply split the Courts of Appeal. As twenty-eight states have noted, the question is of great practical importance for federal prison litigation and warrants resolution by this Court.

The Question Presented is:

Does the exhaustion provision of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), require a federal district court to dismiss a prisoner's entire action challenging prison conditions if the complaint contains both exhausted and unexhausted claims?

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Petitioner Lamar Jones Bey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-27a) is published at 407 F.3d 801 (CA6 2005). The judgment of the district court granting summary judgment in favor of respondents (Pet. App. 28a) and the opinion and order of the district court approving and adopting the report and recommendation of the magistrate judge (Pet. App. 29a-31a) are unpublished. The report and recommendation of the magistrate judge (Pet. App. 32a-50a) is also unpublished.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 51a) on October 12, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Prison Litigation Reform Act, ("PLRA"), 42 U.S.C. § 1997e, provides in relevant part that:

> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such

administrative remedies as are available are exhausted.

* * * *

STATEMENT OF THE CASE

1. This petition presents an important, unresolved issue of federal statutory interpretation that has resulted in a substantial conflict of opinion among the federal circuit courts: whether § 1997e(a) of the PLRA—which provides that no prisoner shall bring an action concerning prison conditions under federal law "until such administrative remedies as are available are exhausted"—requires a rule of "total exhaustion". In other words, is a federal district court required to dismiss a prisoner's entire action challenging prison conditions if the complaint contains both exhausted and unexhausted claims?

In this case, the Sixth Circuit joined the Eighth and Tenth Circuits in answering the Question Presented in the affirmative. Pet. App. 10a ("We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA.") These three circuits have taken the position that "total exhaustion" is required by the text of section 1997e(a) as well as the policies underlying the PLRA. *See e.g.,* Pet. App. 10a ("We adopt the total exhaustion rule, in large part, because the plain language of the statute dictates such a result. . . . The policies underlying the PLRA also suggest that Congress intended the courts to apply total exhaustion to a prisoner's petition"); *Ross v. Bernalillo*, 365 F.3d 1181, 1190 (CA10 2004) ("To start, the language in § 1997e(a) itself suggests a requirement of total exhaustion. . . . Further, we believe

the policies underlying the PLRA point toward a requirement of total exhaustion.").

By contrast, the Second and Ninth Circuits have answered the Question Presented in the negative. These two circuits have squarely rejected the textual and policy arguments advanced by the Sixth, Eighth, and Tenth Circuits:

> In this appeal, we consider whether. . . § 1997e(a) requires a federal district court to dismiss in its entirety a prisoner's complaint [that] contains any claim that has not been administratively exhausted within the prison system. Based on an examination of the text of section 1997e and the policies underlying the PLRA, we conclude that such complete dismissal is not required.

Ortiz v. McBride et al., 380 F.3d 649, 657-58 (CA2 2004); *Lira v Herrera et al.*, 427 F.3d 1164, 1170 (CA9 2005) ("After reviewing relevant principles announced by the Supreme Court, the statutory language, and underlying policy considerations, we agree. . . that the Second Circuit's approach is appropriate, *see Ortiz,* 380 F.3d at 651, and hold that the "total exhaustion-dismissal" rule urged by defendants is not mandated by 1997e(a).")

2. The facts pertinent to this Petition are quite simple. Petitioner is an inmate who filed a complaint pursuant to 42 U.S.C. § 1983 alleging both First and Eighth Amendment claims against two prison officials. Pet. App. 2a. Defendants filed a motion for summary judgment, and the district court referred the case to a magistrate judge who:

> recommended that summary judgment be granted to the defendants because [Petitioner] had not fully exhausted his administrative remedies as required by the [] PLRA. . . . Alternatively, the magistrate judge stated that even if [Petitioner] had exhausted his administrative remedies, none of his claims was sufficient to survive summary judgment. The district court adopted the report and recommendation and granted the defendants' motion for summary judgment.

Pet. App. 2a-3a.

On appeal, the Sixth Circuit conducted a *de novo* review of the district court's exhaustion determination and held that "[b]ecause [Petitioner's] complaint alleged both exhausted and unexhausted claims, we must definitively answer an open question in this circuit: whether the PLRA requires a complete dismissal of a prisoner's complaint when that prisoner alleges both exhausted and unexhausted claims." Pet. App. 7a. Over a lengthy and spirited dissent by Judge Clay, Pet. App. 16a-27a, the majority adopted the "total exhaustion" rule, reversed the district court's dismissal with prejudice, and remanded to the district court to dismiss the entire case without prejudice. Pet. App. 15a.

Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc,* which was denied on October 12, 2005. Pet. App. 51a.

This petition followed.

REASONS FOR GRANTING THE PETITION

As noted by the divided Sixth Circuit panel below, this case squarely presents a question that has split the Courts of Appeal. Pet. App. 9a ("[A] split exists among the other circuits that have addressed this issue."). The circuit conflict on this issue is well recognized. *See Lira*, 427 F.3d at 1170 ("We are not the first circuit to consider this issue. The Second, Sixth, Eighth, and Tenth Circuits have all considered the same question, with conflicting results."); *Cannon v. Washington*, 418 F.3d 714 (CA7 2005) ("We first note our awareness of conflicting decisions issued by our sister circuits as to whether the PLRA permits a prisoner to proceed on exhausted claims when his complaint also raises unexhausted claims.").[1]

As twenty-eight states have already recognized, *see* pages 7-9, *infra*, the resolution of the Question Presented is of great practical importance for federal prison litigation. The Question Presented recurs with tremendous frequency.[2] Without this Court's intervention, the PLRA's

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[1] *See also Note, Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(a) Unduly Burdens Courts and Prisoners*, 73 Ford. L. Rev. 2289 (2005) (recognizing split); *Note, Exhaustion Under the PLRA: Reinforcing the Rehabilitative Function of American Prisons*, Widener L. J. 989, 1003-04 (2005) (same).

[2] *See, e.g., Brown v. Alameida*, 2004 U.S. Dist. LEXIS 9941 (N.D. Cal. 2004) (unreported); *Chamberlain v. Overton*, 326 F. Supp. 2d 811 (E.D. Mich. 2004); *Mubarak v. California Dep't of Corr.*, 315 F. Supp. 2d 1057 (S.D. Cal. 2004); *Carrion v. Wilkinson*, 309 F. Supp. 2d 1007 (N.D. Ohio 2004); *Pogue v. Calvo*, 2004 U.S. Dist. LEXIS 3233 (N.D. Cal. 2004) (unreported); *Ellison v. California Dep of Corr.*, 2003 U.S. Dist. LEXIS 8545 (N.D. Cal. 2003) (unreported); *Martinez v. Lamarque*, 2003 U.S. Dist. LEXIS 8541 (N.D. Cal. 2003) (unreported); *Smeltzer v. Hook*, 235 F. Supp. 2d 736 (W.D. Mich. 2002); *Johnson v.*

exhaustion requirement will continue to be applied inconsistently throughout the country. This case presents the proper vehicle and time to address the Question Presented.

Certiorari should be granted.

I. The Courts of Appeals Are Deeply Divided Over the Question Presented.

As noted above, the Question Presented is the subject of a three-to-two circuit conflict openly acknowledged by the courts of appeals. In this case, a divided Sixth Circuit panel joined the Eighth, and Tenth Circuits in holding that § 1997e(a) of the PLRA *requires* the complete dismissal of any action when the complaint contains both exhausted and unexhausted claims. Pet. App. 10a ("We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA."); *Ross*, 365 F.3d at 1189 ("We

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Price, 2002 U.S. Dist LEXIS 14371 (S.D. Mich. 2002) (unreported); *Rivera v. Whitman*, 161 F. Supp. 2d 337 (D.N.J. 2001); *Julian-Bey v. Crowley*, 2000 U.S. Dist. LEXIS 14071 (W.D. Mich. 2000), *aff'd*, 2001 U.S. App. LEXIS 26192 (6th Cir. 2001) (unreported); *Thorp v. Kepoo*, 100 F. Supp. 2d 1258 (D. Haw. 2000); *Keenan v. Twommey*, 1999 U.S. Dist. LEXIS 11829 (W.D. Mich. 1999), *aff'd*, 2000 U.S. App. LEXIS 21200 (6th Cir. 2000) (unreported); *Henderson v. Sebastian*, 2004 U.S. Dist LEXIS 17581 (W.D. Wis. 2004) (unreported); *Blackmon v. Crawford*, 305 F. Supp. 2d 1174 (D. Nev. 2004); *Alexander v. Davis*, 282 F. Supp. 2d 609 (W.D. Mich. 2003); *Armstrong v. Gilman*, 2001 U.S. Dist. LEXIS 21016 (W.D. Mich. 2001) (unreported); *King v. Zamiara*, 2001 U.S. Dist. LEXIS 17019 (W.D. Mich. 2001) (unreported); *Johnson v. True*, 125 F. Supp. 2d 186 (W.D. Va. 2000), *appeal dismissed*, 2002 U.S. App. LEXIS 7153 (4th Cir. 2002) (unreported); *Graham v. Moskalik*, 2000 U.S. Dist. LEXIS 11671 (W.D. Mich. 2000) (unreported); *Cooper v. Garcia*, 55 F. Supp. 2d 1090 (S.D. Cal. 1999); *Jenkins v. Toombs*, 32 F. Supp. 2d 955 (W.D. Mich. 1999).

agree that the PLRA contains a total exhaustion requirement, and hold that the presence of unexhausted claims in Ross' complaint required the district court to dismiss his action in its entirety without prejudice").[3]

In square conflict with the Sixth, Eighth, and Tenth Circuits, the Second and Ninth Circuits have held that § 1997e(a) of the PLRA does *not* require the complete dismissal of an action when a "mixed" complaint is filed. *See Ortiz*, 380 F.3d at 656 ("The question, then, is whether the district court was therefore required, under a so-called "total exhaustion" rule, to dismiss the action in its entirety despite the presence of an otherwise viable, fully exhausted claim. We think not."); *Lira*, 427 F.3d at 1170 (holding "that the 'total exhaustion-dismissal' rule urged by defendants is not mandated by § 1997e(a).").

II. This Court's Resolution of the Question Presented Is of Great Practical Importance for Federal Prison Litigation.

As twenty-eight states have already recognized, the resolution of the Question Presented is of great practical

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[3] The rule adopted by these circuits is best described as one of "total exhaustion-*dismissal*" rather than merely as one of "total exhaustion". This distinction is important in describing the circuit conflict because, as one Court of Appeals has recently noted, "[t]here is no dispute that the action must be 'totally exhausted' in the sense that only exhausted claims can be litigated. The dispute concerns only whether the action must be dismissed and refiled if there are unexhausted claims included." *Lira*, 427 F.3d at 1169 n.6.

importance for federal prison litigation.[4] In the words of the State of New York:

> The importance of the issue presented here is underscored by the number of potentially affected cases. Tens of thousands of prisoner civil rights cases are commenced each year. *See* Administrative Office of the U.S. Courts, Judicial Facts and Figures, Table 2.2 (2003), http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf (24,073 prisoner civil rights cases filed in federal district courts in 2003). [P]risoners' Section 1983 actions 'routinely seek to address more than one grievance – sometimes a laundry list of grievances – relating to different events or circumstances'. Without a definitive ruling from this Court, the PLRA's exhaustion requirement will continue to be applied inconsistently in the courts across the country.

Petition for Writ of Certiorari in *McBride et al. v. Ortiz* (04-668), 2004 WL 2652265 (U.S.) at *9-10 (citation omitted) (hereinafter, "*Ortiz* Petition").

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[4] *See* Brief of the States of California, Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Pennsylvania, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and West Virginia as *Amici Curiae* in Support of Petitioners (represented by the New York State Attorney General) in *McBride et al. v. Ortiz* (04-668), 2005 WL 154022 (U.S.) (hereinafter, "Brief of 27 States"). It is worth noting that the Michigan Attorney General—likely counsel for Respondents in this matter—was a party to this Brief of 27 States.

The competing arguments advanced on this issue illustrate the very importance of its resolution by this Court. On the one hand, the twenty-eight states who have urged this Court to affirm a "total exhaustion" rule believe that the position of the Sixth, Eighth, and Tenth Circuits:

> will allow for more-efficient and streamlined litigation. In many cases filed against the *amici* States and state correctional officials, the action contains multiple claims with interrelated and interconnected legal and factual allegations spanning multiple dates and against multiple parties. The total-exhaustion rule will ensure that the *amici* States have an opportunity to address all of an inmate's grievances internally before the inmate files suit. It will ensure that *amici* States can take corrective action for all interrelated and interconnected factual circumstances, thereby obviating the need for litigation. And it will ensure that cases ultimately brought to court have a full and complete administrative record of all claims.[5]

On the other hand, opponents of the "total exhaustion" rule—like Petitioner—agree with the Second and Ninth Circuit who "do not think that a requirement that district courts dismiss 'mixed' actions in their entirety would help achieve Congress's goal of improving the quality of, or judicial efficiency in disposing of, prisoners' section 1983 suits." *Ortiz*, 380 F.3d at 658. Indeed, adoption of the "total exhaustion" rule will adversely and

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[5] Brief of 27 States, 2005 WL 154022 (U.S.) at *3.

disproportionately impact *pro se* plaintiffs without achieving any real efficiency gains. As the Second Circuit observed, "it is doubtful that action-dismissal rather than claim-dismissal will do more than require plaintiffs who bring 'mixed' actions to re-file their claims with the claims that were held by the district court to be unexhausted simply omitted." *Id.* Plaintiffs represented by counsel, or well-schooled in prison litigation, will know that they may simply re-file their action with the unexhausted claims deleted, requiring Courts to waste precious judicial resources reacquainting themselves with the facts of the case for a second (or even third or fourth) time. As the Second Circuit has observed:

> It hardly seems to aid efficiency to require that, if the court decides the claim-exhaustion issue against the prisoner, it must then dismiss any remaining exhausted claims only to allow the same case, absent the unexhausted claims, to be re-instituted, heard again on the exhausted issues, and then decided. This is all the more true when the exhausted and unexhausted claims are factually interrelated and the district court is therefore required to familiarize itself with the same factual background of the case twice.

Id. at 659 (footnote omitted).

At the same time, less sophisticated litigants will find their effort to obtain redress stymied by exhaustion rules they may simply not fully comprehend and dissuaded or delayed by the requirement of a new filing fee. The practical reality of a "total exhaustion" rule is accurately

captured by Judge Clay in his dissent from the panel decision below:

> [I]n practice, the total exhaustion rule is not only likely to amount to a monetary penalty, it is also likely to be a convenient means for district courts to expediently close the courthouse door to *pro se* prisoner litigants, without proper regard for the merits of their claims or consideration of their status. *See Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) ("[A] pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers."

Pet. App. 26a-27a (Clay, J., dissenting).

III. This Case Presents the Proper Vehicle and Time to Resolve the Question Presented.

1. This case presents the proper vehicle and time to address the Question Presented. The issue was squarely presented and resolved below. Indeed, the panel opinion recognizes the conflict (Pet. App. 9a-10a), extensively analyzes the Question Presented before adopting the position of the Eighth and Tenth Circuits (Pet. App. 10a-15a), and contains a lengthy dissent advocating the competing interpretation of 1997e(a). (Pet. App. 16a-27a)[6].

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[6] Petitioner is aware of two petitions currently pending in this Court that ask this Court to address the Question Presented. *See Williams v. Overton et al.* (05-7142); *Jones v. Bock* (05-7058). These petitions ask this Court to review unpublished Sixth Circuit decisions,

Finally, the Quested Presented is unquestionably outcome determinative. *See* Pet. App. 15a (answering the Question Presented in the affirmative and, consequently, ordering the district court to dismiss Petitioner's lawsuit without prejudice rather than reaching the merits of Petitioner's appeal).

2. Although this Court has previously declined to resolve the Question Presented, *see McBride et al. v. Ortiz,* 125 S.Ct. 1398 (2005), none of the three arguments advanced in opposition to the *Ortiz* Petition is applicable to this case. First, the Respondent in Ortiz argued that the circuit split was not "meaningful" because "no circuit now mandates. . . that pleading an unexhausted claim must result in dismissal of all claims and re-filing of exhausted

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Williams, 2005 WL 1513102 (CA6 2005) (unpublished) and *Jones*, 2005 WL 140020 (CA6 2005) (unpublished), that provide no analysis of the Question Presented but instead merely cite to the panel decision *in this case*. In the words of the Williams panel:

> Until fairly recently, there had been a lack of clear consensus on whether the language of 42 U.S.C. 1997e(a) compels total exhaustion. Recently, however, this court 'definitively answer[ed]' the question of whether a prisoner's complaint containing both exhausted and unexhausted claims must be dismissed under the PLRA in the affirmative. **_See_ Jones Bey v. Johnson, 407 F.3d 801, 805 (6th Cir. 2005).** . . . *Jones Bey*, requires that the entire action be dismissed due to Williams' failure to exhaust his medical claims. **See Jones Bey, 407 F.3d at 807**.

Williams, 2005 WL 1513102 at *3 (emphasis added).

More importantly, the *Williams* and *Bosk* cases are inappropriate vehicles to address the Question Presented. The petitions in those cases present two questions for review. Resolution of the first question—which is itself factually complex and uncertworthy—is necessary in order to reach the Question Presented.

claims." Brief in Opposition to Petition for a Writ of Certiorari in *McBride et al. v. Ortiz*, 2005 WL 123446 (U.S.) at *7 (hereinafter, "*Ortiz* BIO"). Such a mandate, however, is *precisely* what was established by the holding of this case. Pet. App. 1a-15a.

Second, the Respondent in *Ortiz* argued that the case was an inappropriate vehicle for review of the total exhaustion question because the prisoner's unexhausted claim had already been dismissed at the time the Question Presented was addressed by the Court of Appeals. *Ortiz* BIO, 2005 WL 123446 (U.S.) at *8-9. No such problem exists here.

Finally, the Respondent in *Ortiz* argued that the Second Circuit's decision was correct on the merits because "[t]he plain language of 42 USC 1997e(a) does not support a total exhaustion rule" and "[a] total exhaustion rule does not serve the PLRA's purposes better than the dismissal of unexhausted claims." *Id.* at *9-13. The holding of the Sixth Circuit Panel in this case squarely conflicts with *Ortiz*. As such, the merit-based argument advanced by the *Ortiz* BIO is itself another reason why *this* Petition should be granted. Put simply, the Sixth Circuit's decision in this case is wrong on the merits.

CONCLUSION

The Question Presented is an issue of substantial importance to both states and litigants and is one on which the holdings of three circuits directly conflict with two others. The present case squarely raises this Question. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: January 9, 2006

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LAMAR WILLIAM JONES BEY,
Plaintiff-Appellant,
v.
KELLY JOHNSON AND WAYNE TRIERWEILER,
Defendants-Appellees.

No. 03-2331.

Submitted: Dec. 3, 2004.
Decided and Filed: April 27, 2005.
Rehearing En Banc Denied Oct. 12, 2005.

ON BRIEF: John L. Thurber, Office of the Attorney General, Lansing, Michigan, for Appellees. Lamar William Jones Bey, Munising, Michigan, pro se.

Before: SILER and CLAY, Circuit Judges; BERTELSMAN, District Judge.*

SILER, J., delivered the opinion of the court, in which BERTELSMAN, D. J., joined.

CLAY, J., (PP. 809-13), delivered a separate opinion concurring in part and dissenting in part.

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* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

SILER, Circuit Judge.

Plaintiff Lamar William Jones Bey appeals from an order entered by the United States District Court for the Western District of Michigan, granting summary judgment to defendants Kelly Johnson and Wayne Trierweiler and dismissing with prejudice Jones Bey's First and Eighth Amendment claims brought pursuant to 42 U.S.C. § 1983. Because Jones Bey did not fully exhaust his administrative remedies, we REVERSE and REMAND this case to the district court to dismiss his petition without prejudice.

I.

A. Procedural History

Jones Bey is a prisoner at the Alger Maximum Correctional Facility in Munsing, Michigan. Johnson is a guard at the facility, and Trierweiler is the prison's grievance coordinator. Between October 2001 and April 2002, Jones Bey filed nine grievances against Johnson alleging various instances of misconduct and one against Trierweiler alleging a mishandling of these grievances.

Jones Bey filed this action against the defendants in their individual capacity in July 2002 claiming that both defendants violated his First Amendment rights, and that Johnson also violated his Eighth Amendment right to be free from the use of excessive force. The district court referred this case to a magistrate judge. The magistrate judge recommended that summary judgment be granted to the defendants because Jones Bey had not fully exhausted

his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e. Alternatively, the magistrate judge stated that even if Jones Bey had exhausted his administrative remedies, none of his claims was sufficient to survive summary judgment. The district court adopted the report and recommendation and granted the defendants' motion for summary judgment.[1]

B. Factual History

1. Claims Against Defendant Johnson

In October 2001, Jones Bey alleges that he was arbitrarily refused his "yard," or his time to exercise in the prison yard. Johnson claims that Jones Bey was not fully dressed when she came to his cell, and, therefore, he was not entitled to leave his cell. Jones Bey filed a grievance over this incident, in accordance with the Michigan Department of Corrections' three-step grievance procedure.[2] It was denied at all three steps.

After filing this initial grievance, Jones Bey contends that

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[1] Jones Bey also set forth a complaint for ethnic intimidation under Michigan state law. Because the district court dismissed all of his federal claims, it declined to exercise supplemental jurisdiction over this claim. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

[2] The Michigan Department of Corrections regulations require the prisoner to first file a grievance with the internal grievance coordinator at the prison in which he is incarcerated. If the grievance is denied at this level, the prisoner can appeal it to the prison's warden. If denied a second time, the prisoner can exercise a final appeal to the office of the Michigan Department of Corrections' director. *See* MDOC Policy Directive 03.02.130. Once the prisoner has undertaken all three of these steps, his grievance is considered fully exhausted.

Johnson engaged in a series of retaliatory acts against him. Johnson allegedly came to Jones Bey's cell and said, "you like to write grievances huh? You know me and the counselor are related. I'm going to see if I can have him put some pressure on you to break you up from that habit."[3] Jones Bey filed a grievance concerning this statement which he claims was appealed through Step III, but the record shows that the director's office never received the grievance.

Jones Bey also contends that five days later, while he was out on his yard period, Johnson searched, or "shook down," his cell. When Jones Bey returned to his cell, he allegedly found his possessions in disarray and pages torn out of two of his Islamic books. When Jones Bey confronted Johnson on the issue, she allegedly used racial slurs and told him to write a grievance about his complaints. He did file a grievance against Johnson, complaining both about the search and the use of racial slurs. He attached handwritten affidavits from two other prisoners claiming that they heard the sounds of paper tearing and the toilet flushing when Johnson was searching Jones Bey's cell. Again, this grievance was not appealed through Step III. Jones Bey sent a letter to the director's office concerning this grievance, but the return letter indicated that the director had not received Jones Bey's appeal on this grievance.

In December 2001, Jones Bey filed another grievance

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[3] Apparently there is a grievance counselor at the prison named Robert Johnson. Defendant Johnson denies both that she is related to Robert Johnson and that she made this statement.

against Johnson for her use of racial slurs and derogatory language. He again attached handwritten affidavits from other prisoners who claim to have overheard these comments. This grievance was fully exhausted, but the prison determined that these claims had already been addressed at "the local level" and in Jones Bey's earlier grievances filed against Johnson.

On the same day, Johnson filed a major misconduct report against Jones Bey alleging "Assault and Battery (staff-victim)." Johnson's report alleged that in the course of returning Jones Bey to his cell, he spun his body around and swung Johnson's hands against the food slot as she was trying to remove his handcuffs, resulting in some redness and pain in her hands. Jones Bey, however, claimed that she handcuffed him too tightly and that she pulled on the handcuffs forcing *his* hands against the food slot. He claims that he suffered "extreme pain" as a result of this altercation, but an X-ray showed no broken bones. Three days later, Jones Bey filed a grievance against Johnson alleging that Johnson filed the major misconduct report in retaliation for all of the grievances he filed against her. He additionally alleges that Johnson fabricated the misconduct report in order to conceal her alleged misconduct.[4] In January 2002, he was cleared of all wrong doing against

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[4] Issues involving major misconduct reports are not grievable, presumably because the misconduct hearing should settle all claims relevant to the alleged misconduct. Jones Bey alleges that Johnson filed a major misconduct report in order to preclude him from filing a grievance. Because Johnson filed her misconduct before Jones Bey could file a grievance, Jones Bey had no choice but to defend his position at the hearing.

Johnson after an independent hearing on the major misconduct charge.

Jones Bey alleges that after he was acquitted of the major misconduct, Johnson made threatening remarks about "getting even" and put him in a segregation yard as retaliation. He filed and exhausted a grievance with respect to this claim. He also filed another grievance against her for alleged use of more racial slurs. This grievance, too, was denied at all three stages. Finally, Jones Bey alleges in his complaint that an officer named Zimmerman "shook down" his cell and confiscated some of his legal papers on Johnson's orders. However, this complaint was never grieved. Johnson denies all of the allegations against her, claiming that she never made intimidating statements or retaliated against Jones Bey in any way.

2. Claims Against Defendant Trierweiler

Jones Bey's only claim against Trierweiler stems from Trierweiler's alleged mishandling of grievances filed by Jones Bey. Jones Bey states that Trierweiler arbitrarily rejected or denied his grievances because they were unclear, not concise, contained extraneous information, or related to non-grievable or already grieved issues. He also claims that Trierweiler did not follow the Prisoner's Grievance Policy set forth by the Michigan Department of Corrections. When this grievance reached Step III, the director noted that even if Trierweiler denied a grievance at Step I, Jones Bey could always have appealed his complaints to Steps II and III.

II.

We review the district court's grant of summary judgment *de novo*. *Copeland v. Machulis*, 57 F.3d 476, 478-79 (6th Cir.1995). Furthermore, we review the district court's exhaustion determination in a PLRA case *de novo*. *Curry v. Scott*, 249 F.3d 493, 503 (6th Cir. 2001).

Because Jones Bey's complaint alleged both exhausted and unexhausted claims, we must definitively answer an open question in this circuit: whether the PLRA requires a complete dismissal of a prisoner's complaint when that prisoner alleges both exhausted and unexhausted claims. We hold that it does.

The PLRA requires that a prisoner must exhaust administrative remedies before filing suit in the district court. It states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2004). The plaintiff-prisoner has the burden of proving that a grievance has been fully exhausted, *Baxter v. Rose*, 305 F.3d 486, 488 (6th Cir. 2002), and the prisoner must attach documentation to the complaint as proof. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). Exhaustion is not jurisdictional; it is mandatory, *Wyatt v. Leonard*, 193 F.3d 876, 879 (6th Cir. 1999), even if proceeding through the administrative system would be "futile." *Hartsfield v. Vidor*, 199 F.3d 305, 308-10 (6th Cir. 1999).

Although the PLRA's exhaustion requirement is clearly mandatory as to each individual claim, we have specifically left unanswered the question of whether the PLRA's exhaustion requirement applies such that a "mixed" complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies. *See Knuckles El v. Toombs,* 215 F.3d 640, 642 (6th Cir. 2000) ("We reserve to another day the question of whether exhausted claims in a 'mixed' complaint should be addressed when such claims otherwise meet the pleading requirements or whether such a complaint should be dismissed in its entirety.").

Our cases addressing PLRA exhaustion are somewhat inconsistent. At least one of this court's prior decisions suggests that total exhaustion is not required under the PLRA. In *Hartsfield,* 199 F.3d at 309-10, the plaintiff's complaint alleged misconduct by five prison officials; however, the plaintiff only exhausted his administrative remedies against three defendants. Without addressing the issue of total exhaustion, we held that the exhausted claims could be addressed on the merits while the unexhausted claims could be dismissed without prejudice. *Id.* This procedure has been followed in some of our unpublished opinions. *See Williams v. McGinnis,* 234 F.3d 1271, 2000 WL 1679471, at *2 (6th Cir. Nov.11, 2000) (unpublished table decision); *McElhaney v. Elo,* 230 F.3d 1358, 2000 WL 1477498, at *3 (6th Cir. 2000) (unpublished table decision); *Wash v. Rout,* 215 F.3d 1328, 2000 WL 658925, at *1 (6th Cir. May 10, 2000) (unpublished table case); *Riley v. Richards,* 2000 WL 332013, at *2 (6th Cir. Mar.23,

2000) (unpublished table case). However, other unpublished decisions have affirmed the decisions of district courts requiring total exhaustion. *See Bomer v. Hakola,* 84 Fed.Appx. 585, 587 (6th Cir. 2003); *Kemp v. Jones,* 42 Fed.Appx. 744, 745 (6th Cir. 2002); *Mack v. DeWitt,* 40 Fed.Appx. 36, 38 (6th Cir. 2002); *Overholt v. Unibase Data Entry, Inc.,* 2000 WL 799760, 2000 U.S.App. LEXIS 14087, at *6 (6th Cir. June 14, 2000).

Acting without clear guidance from this court, the district courts in this circuit are split on whether the PLRA requires total exhaustion in cases involving "mixed" complaints. *Compare Hubbard v. Thakur,* 344 F.Supp.2d 549, 558-59 (E.D.Mich. 2004) (rejecting total exhaustion rule); *Alexander v. Davis,* 282 F.Supp.2d 609 (W.D.Mich. 2003) (same); *and Jenkins v. Toombs,* 32 F.Supp.2d 955 (W.D.Mich. 1999) (same); *with Chamberlain v. Overton,* 326 F.Supp.2d 811, 816 (E.D.Mich. 2004) (applying total exhaustion); *and Smeltzer v. Hook,* 235 F.Supp.2d 736 (W.D.Mich. 2002) (same). Similarly, a split exists among the other circuits that have addressed this issue. *Compare Ross v. County of Bernalillo,* 365 F.3d 1181, 1190 (10th Cir. 2004) (applying total exhaustion); *Kozohorsky v. Harmon,* 332 F.3d 1141 (8th Cir. 2003) (same);[5] *and Graves v. Norris,* 218 F.3d 884 (8th Cir. 2000) (same);

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[5] Jones Bey contends that the *Kozohorsky* case effectively overrules *Graves v. Norris.* This allegation-which was taken from *Alexander v. Davis,* 282 F.Supp.2d 609, 612 (W.D.Mich. 2003)-is without merit. The *Kozohorsky* case clearly indicates that the Eighth Circuit abides by the total exhaustion rule. *Kozohorsky,* 332 F.3d at 1143. However, it allowed the plaintiff to cure his complaint by deleting unexhausted claims. *Id.* at 1144.

with Ortiz v. McBride, 380 F.3d 649 (2d Cir. 2004) (rejecting total exhaustion). We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA.

The dissent suggests we are going contrary to *stare decisis* by refusing to follow a rule set out in *Hartsfield,* 199 F.3d at 310. Although that decision follows the principle in application, it does not discuss total/partial exhaustion. Perhaps the issue was not raised by the parties in that case. We would never suggest repudiating a holding in a prior decision, but the author of the *Hartsfield* decision was also the author of the subsequent decision in *Knuckles El,* 215 F.3d at 642, in which this court "reserve[d] for another day" this very question. *Id.* The author of the dissent herein was also a member of the panel that decided *Knuckles El.* Moreover, if the decision in *Hartsfield* was so clear, it is strange why other panels of this court and district courts in this Circuit have not always followed it.

We adopt the total exhaustion rule, in large part, because the plain language of the statute dictates such a result. Section 1997e(a) states that no "action" shall be brought in federal court until administrative remedies have been exhausted. However, in subsection (c), the statute allows district courts to dismiss frivolous "actions" *or* "claims." 42 U.S.C. § 1997e(c)(1) & (2). Congress's use of the word "claims" in subsection (c)(2) indicates that "claims" are individual allegations and "actions" are entire lawsuits. *See Ross,* 365 F.3d at 1190 ("To start, the language in § 1997(a) itself suggests a requirement of total exhaustion because it prohibits an 'action' (as opposed to merely preventing a

'claim') from proceeding until administrative remedies are exhausted."); *see also Smeltzer,* 235 F.Supp.2d at 744.

Furthermore, reading subsection (a) and subsection (c)(2) together demonstrate that Congress intended for "action" to mean "suit." If a district court is presented with a "mixed" petition, it has the power under subsection (c)(2) to dismiss any frivolous claims, exhausted or not, *with prejudice.* However, dismissal under subsection (a) allows the court to dismiss the entire action *without prejudice.* The *Smeltzer* court recognized that Congress must have intended that courts could use subsection (c)(2) to dismiss unexhausted claims as frivolous to keep them from "holding up" the others. *Smeltzer,* 235 F.Supp.2d at 744. In the alternative, the court could dismiss the entire action without prejudice and allow the prisoner to re-file only exhausted claims.

The policies underlying the PLRA also suggest that Congress intended the courts to apply total exhaustion to a prisoner's petition. One purpose of the act is to reduce the sheer number of prisoner suits, especially frivolous actions. *See Ortiz,* 380 F.3d at 658 (citing 141 Cong. Rec. 26,553 (1995)) (statement of Sen. Hatch). Congress also intended to give increased powers to prisons so that they could solve their problems according to their own internal dispute resolution systems. *See Alexander v. Hawk,* 159 F.3d 1321, 1326 n. 11 (11th Cir. 1998) (citing 141 Cong. Rec. S14408-01, S417748) (Sept. 27, 1995). "In the PLRA context, a total exhaustion rule would encourage prisoners to make full use of inmate grievance procedures and thus give prison officials the opportunity to resolve prisoner complaints." *Ross,* 365 F.3d at 1190. When the courts

dismiss the actions without prejudice, prisons would have the opportunity to fully resolve the complaint. If the complaint cannot be resolved within the prison, the prisoner could file an action in court with a complete "administrative record that would ultimately assist federal courts in addressing the prisoner's claims." *Id.; see also Rivera v. Whitman,* 161 F.Supp.2d 337, 341-42 (D.N.J. 2001).

Additionally, adopting the total exhaustion rule creates comity between § 1983 claims and habeas corpus claims. The Supreme Court requires total exhaustion in habeas cases to allow state courts the first opportunity to solve prisoners' cases because they are arguably in a better position to analyze and solve the problems. *See Preiser v. Rodriguez,* 411 U.S. 475, 492, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). The PLRA, too, was enacted to allow state prison systems the first chance to solve problems relating to prison conditions. Because both bodies of law were created for similar reasons, their exhaustion rules should be interpreted in a similar manner.[6]

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[6] The dissent cites *Wilkinson v. Dotson,* --- U.S. ----, ----, 125 S.Ct. 1242, 1246, 161 L.Ed.2d 253 (2005), to show that habeas corpus and § 1983 cases are "inherently different." It quotes that "habeas corpus actions require a petitioner fully to exhaust state remedies which § 1983 does not." *Id.* While this statement is true, exhaustion is still required in prisoner § 1983 cases, only the exhaustion must occur within the prison system. Furthermore, the Court's discussion of habeas corpus and § 1983 claims does not suggest drawing comparisons between the two cases is inappropriate, only that the procedures were created for hearing distinct types of claims. *Id.* at 1246-49.

Courts which have not applied the total exhaustion rule claim that there is little similarity between habeas petitions and § 1983 actions. These courts note that total exhaustion is required in the habeas context out of a need for state sovereignty. *See Ortiz,* 380 F.3d at 660; *Jenkins,* 32 F.Supp.2d at 957. However, these courts fail to recognize that while state courts have an interest in resolving habeas cases, state prison systems have a similar interest in resolving cases involving their own institutions. This circuit has already noted the similarities between habeas petitions and § 1983 claims. In *Brown v. Toombs,* we noted: "The [PLRA] has extensive benefits. It recognizes that it is difficult to explain why we require full exhaustion in habeas corpus cases involving life and liberty, but allow direct access in prison rights cases under § 1983." 139 F.3d at 1103. Because we recognize the correlation between habeas petitions and § 1983 actions, we find it appropriate to interpret the PLRA exhaustion requirements in light of habeas corpus rules.[7]

Adoption of the total exhaustion rule would also deter prisoners from bringing additional, piecemeal litigation. *See Ross,* 365 F.3d at 1190. A prisoner whose mixed

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[7] The dissent also notes that drawing comparisons between habeas corpus and § 1983 cases is inappropriate in light of the recent case of *Rhines v. Weber,* --- U.S. ----, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). In *Rhines,* the Court held that, in certain circumstances, a district court may stay a habeas case until all of the prisoner's claims are exhausted. *Id.* at 1535-36. This case did not, however, eliminate or lessen the "total exhaustion" requirement. *Id.* at 1533. Because we are not dealing with a case in which the district court stayed the proceedings pending exhaustion, we decline to address the applicability of *Rhines* to § 1983 cases.

complaint was dismissed by the district court would be left with two options. First, he could wait until all of his claims are exhausted and re-file the action at that time. Or, he could simply institute an action with only the exhausted claims, and then later bring other actions in court after the other issues have been fully addressed through the prison grievance process. While it is true that re-filing an action would require an additional filing fee, we reject the notion that this rule is "unduly punitive," because it does not prevent the prisoner from proceeding *in forma pauperis*. *Contra Jenkins v. Toombs*, 32 F.Supp.2d at 959. Under the total exhaustion rule, a prisoner will have the choice of bringing forth each exhausted claim one at a time, at a potentially greater expense to himself, or to wait and bring all exhausted claims together in one action.

Furthermore, we reject the notion that the total exhaustion rule would create additional, rather than fewer, prisoner lawsuits. *Contra Ortiz*, 380 F.3d at 658 (noting that "such a regimen would create an incentive for prisoners to file section 1983 claims, if they have more than one, in more than one lawsuit"). Even the *Ortiz* court recognized that there are significant procedural rules in place that would encourage bringing all exhausted claims in one action, rather than filing separate actions for each individual claim. *See id.* at 658 n.7. The most obvious deterrent is the filing fee. However, the "three strikes" rule, codified in 28 U.S.C. § 1915(g), creates an additional incentive for

prisoners to join all of their issues in one action.[8]

Finally, we believe that the total exhaustion rule could be easily administered by the district courts. As noted in *Ross*, this rule "would relieve district courts of the duty to determine whether certain exhausted claims are severable from other unexhausted claims that they are required to dismiss." 365 F.3d at 1190 (citing *Rose v. Lundy*, 455 U.S. 509, 519, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)). The district courts would simply apply the familiar rule from the habeas context to § 1983 claims. Furthermore, prisoners who are well acquainted with this rule in the habeas context should "be expected to adhere to this straightforward exhaustion requirement" in the § 1983 context. *Id.*

For the reasons stated above, we now adopt the total exhaustion rule and we REVERSE and REMAND this case to the district court to dismiss Jones Bey's petition without prejudice.[9]

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[8] Under this statute, a prisoner who files an action *in forma paupris* receives a "strike" if the action is "frivolous, malicious, or fails to state a claim upon which relief may be granted." *Id.* Once the prisoner accrues three "strikes," that prisoner is barred from proceeding *in forma pauperis* in any additional § 1983 action. Although the prisoner is not totally barred from filing claims in court, he must now do so at his own expense.

[9] Jones Bey alternatively argues that he did exhaust his administrative remedies, but his attempts at exhaustion were frustrated by Twierweiler. Although exhaustion is mandatory, *see Thomas v. Woolum*, 337 F.3d 720, 725 (6th Cir. 2003), prison officials do not have to affirmatively provide information on how to proceed with individual claims. *Brock v. Kenton County*, 2004 WL 603929, at *3 (6th Cir. Mar.23, 2004).

CLAY, Circuit Judge, concurring in part and dissenting in part.

While I join, in part, the majority's ultimate conclusion that Jones-Bey's First Amendment retaliation claim against Defendant Johnson must be dismissed without prejudice for failure to exhaust administrative remedies I believe that the majority's failed attempt to apply a total exhaustion rule is foreclosed by our prior decision in *Hartsfield v. Vidor,* 199 F.3d 305 (6th Cir. 1999). Although I respectfully dissent from the exhaustion holding reached by my colleagues, I am not sure that a dissent is actually necessary because the majority's decision constitutes a nullity to the extent that it conflicts with *Hartsfield.*

We recently held that when a prison "totally fail[s] to respond to [a] grievance," that grievance should be considered exhausted for the purposes of § 1997e(a). *Boyd v. Corrections Corporation of America,* 380 F.3d 989, 996 (6th Cir. 2004). The prisoner in *Boyd* submitted evidence that he filed a grievance, that the grievance was delivered to the appropriate office, and that the officials did not respond. *Id.* Even under this rule, Jones Bey cannot show that he exhausted his administrative remedies. Although he presents evidence that he started the process and even wrote letters inquiring on the status of his grievances, he has not proven that the grievance was appropriately delivered to the correct office. Thus, Jones Bey's case can be distinguished from the plaintiff in *Boyd.*

Furthermore, Jones Bey's reliance on *Thomas v. Woolum,* 337 F.3d 720 (6th Cir. 2003), is misplaced. *Thomas* requires a prisoner to exhaust his administrative remedies, even if those remedies are no longer timely. *Id.* at 727. As evidenced by his brief and some of his other grievances, he understood the need to exhaust futile claims, including those that were untimely. For these reasons, Jones Bey cannot prove that administrative remedies were unavailable to him.

In *Hartsfield,* this Court confronted exactly the same situation that we face today- and reached the opposite conclusion. The prisoner-plaintiff in *Hartsfield* filed a complaint with various claims against multiple defendants, some of which were exhausted and some of which were not. We held that the unexhausted claims must be dismissed; however, we permitted the exhausted claims to move forward and be resolved on the merits. *Id.* at 309. *Hartsfield* is a binding opinion in this Circuit, and it has been correctly cited in a number of our unpublished decisions as holding that "[if] a complaint contains exhausted and unexhausted claims, the district court may address the merits of the exhausted claims and dismiss only those that are unexhausted." *Williams v. McGinnis,* 234 F.3d 1271, 2000 WL 1679471 at **2 (6th Cir. 2000) (citing *Hartsfield,* 199 F.3d at 309); *accord Fisher v. Wickstrom,* 230 F.3d 1358, 2000 WL 1477232 at *1 (6th Cir. 2000); *McElhaney v. Elo,* 230 F.3d 1358, 2000 WL 1477498 at **3 (6th Cir. 2000); *Wash v. Rout,* 215 F.3d 1328, 2000 WL 658925 at *1 (6th Cir. 2000); *Riley v. Richards,* 210 F.3d 372, 2000 WL 332013 at *2 (6th Cir. 2000). Additionally, even if one were to argue that *Hartsfield* did not expressly hold that a partial exhaustion rule applies, the *Hartsfield* panel indisputably could not have decided the case in the way that it did if total exhaustion was required. Thus, *Hartsfield* definitively foreclosed the application of the total exhaustion rule in this Circuit.

The majority completely ignores *Hartsfield* 's import, instead relying on our subsequent opinion in *Knuckles El v. Toombs,* in which we purported to "reserve for another

day" the question of whether exhausted claims in a 'mixed' complaint may move forward. *See* 215 F.3d 640, 642 (6th Cir. 2000). However, the majority's reliance on *Knuckles El* is misplaced; *Knuckles El* failed to even cite to *Hartsfield,* and thus it incorrectly described the state of PLRA exhaustion in this Circuit. The question *Knuckles El* claimed to leave open was not an open question at all; it had already been answered in *Hartsfield.* Furthermore, because *Hartsfield* was decided first, subsequent panels are required to follow it under 6TH CIR. R. 206(c), which mandates that "[r]eported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court." *See United States v. Davis,* 397 F.3d 340, 350 n. 7 (6th Cir. 2005) (citing Rule 206(c)); *Valentine v. Francis,* 270 F.3d 1032, 1035 (6th Cir. 2001) (same). Because we are bound by *Hartsfield* unless and until the *en banc* court holds otherwise, the majority's contrary opinion is not the controlling law in the Sixth Circuit, and should not be followed by future panels of this Court.

The majority feebly attempts to disclaim the precedential value of *Hartsfield* by noting that the same judge authored both *Hartsfield* and *Knuckles El,* and that I sat on the *Knuckles El* panel; however, these facts are of no consequence whatsoever. Regardless of its author or panel membership, it is clear that *Knuckles El* incorrectly construed the state of exhaustion law in this Court by improperly ignoring precedent. In addition, the majority's suggestion that *Hartsfield* was unclear is undermined by the

fact that numerous panels properly construed *Hartsfield* both before and after the issuance of *Knuckles El*. *See, e.g., Williams,* 2000 WL 1679471 (decided after *Knuckles El*); *Fisher,* 2000 WL 1477232 (same); *McElhaney,* 2000 WL 1477498 (same); *Wash,* 2000 WL 658925 (decided before *Knuckles El*); *Riley,* 2000 WL 332013 (same).[1] Instead of acknowledging that *Knuckles El* mistakenly overlooked precedent, the majority condemns itself to repeat the mistake by once again misconstruing *Hartsfield.*

Notwithstanding the fact that the majority's holding ignores the principle of *stare decisis,* its reliance on the PLRA's language to apply the total exhaustion rule is unpersuasive. While it is true that § 1997e(a) states that no "action" shall be brought as opposed to no "claim," "it [does not] follow [] that the only possible response to the impermissibility of the bringing of the action is to dismiss it in its entirety- to kill it rather than to cure it." *Ortiz v. McBride,* 380 F.3d 649, 657 (2d Cir. 2004). The text of § 1997e(a) is far "'too ambiguous' to sustain the conclusion that Congress intended" for a total exhaustion rule to be applied. *Id* at 657-58 (quoting *Rose v. Lundy,* 455 U.S. 509, 516, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)); *see also Henderson v. Sebastian,* No. 04-C-0039-C, 2004 WL 1946398 at *6 (W.D.Wis. Aug.25, 2004) (quoting *Alexander v. Davis,* 282 F.Supp.2d 609, 610 (W.D.Mich.2003)) (noting that "courts have characterized this linguistic interpretation as a 'thin reed' on which to base such a weighty conclusion"). It is precisely because of this ambiguity that the majority must

[1] Furthermore, the author of the majority opinion in the instant case sat on the panel in *Wash.*

necessarily perform a gymnastic interpretation of other subsections of the statute in order to reach its conclusion that Congress "intended" total exhaustion.

The majority's discussion of § 1997e(c) is entirely unhelpful, inasmuch as that section appears to use the term 'action' "interchangeably with 'claim.'" *Henderson,* 2004 WL 1946398 at *6. Additionally, applying the tenet of statutory construction "that similar language contained within the same statute must be accorded a consistent meaning," *National Credit Union Administration v. First National Bank and Trust Co.,* 522 U.S. 479, 501, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998), under a total exhaustion regime the application of a consistent meaning to "action" in § 1997e(a) and (c)(1) renders subsection (c)(2) superfluous. Section 1997e(c)(1) states that a court shall "dismiss any *action* brought ... if the court is satisfied that the *action* is frivolous, malicious," etc., while § 1997e(c)(2) states that "[i]n the event that a *claim* is, on its face, frivolous, malicious," etc., "the court may dismiss the underlying *claim* without first requiring the exhaustion of administrative remedies." In order to be consistent, a court "would be required to dismiss a prisoner's entire complaint [under subsection (c)(1)] if any of the claims therein were found to be frivolous or insufficient to justify relief." *Jenkins v. Toombs,* 32 F.Supp.2d 955, 958 (W.D.Mich. 1999). However, if subsection (c)(1) requires dismissal of an action for frivolousness, then subsection (c)(2)'s reference to dismissal of frivolous claims would be entirely unnecessary. *Id.; accord Hubbard v. Thakur,* 344 F.Supp.2d 549, 555-56 (E.D.Mich. 2004).

Because the statutory language does not unambiguously require total exhaustion, the majority turns its discussion to the purposes behind the PLRA. It is undisputed that "Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle,* 534 U.S. 516, 524, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). However, the purposes underlying the statute are better served by a partial exhaustion rule than by the total exhaustion rule advocated by the majority. There is a danger that rather than lessening the number of suits filed, the total exhaustion rule will increase piecemeal litigation by encouraging prisoners to file additional § 1983 lawsuits. *See Ortiz,* 380 F.3d at 658 (holding that it is "doubtful" that dismissing actions rather than individual claims "will do more than require plaintiffs who bring 'mixed' actions to refile their claims with the claims that were held by the district court to be unexhausted simply omitted."). In other words, "prisoners are likely to simply amend their complaints to eliminate the unexhausted claims and refile," leaving the district court "with exactly the same claims that could have been resolved at the outset." *Jenkins v. Toombs,* 32 F.Supp.2d 955, 959 (W.D.Mich. 1999). Consequently, the partial exhaustion rule is more efficient, and thus more in line with the purposes of the PLRA, than the total exhaustion rule the majority seeks to adopt. In addition, regardless of whether total or partial exhaustion is applied, prisoners are still required to fully exhaust any claims they wish to press in federal court, and district courts are clearly barred from resolving any grievances which have not been submitted to prison officials. *See Booth v. Churner,* 532 U.S. 731, 121 S.Ct. 1819, 149

L.Ed.2d 958 (2001); *Curry v. Scott,* 249 F.3d 493, 501 (6th Cir. 2001); *see also Ortiz,* 380 F.3d at 661 ("[A] rule permitting the dismissal of unexhausted claims does indeed defer to state administrative proceedings by insisting that prison administrators adjudicate each prisoner's section 1983 claim in the first instance."). Finally, prisoners already have an incentive not to file multiple lawsuits because of multiple filing fees and 28 U.S.C. § 1915(g)'s 'three strikes' rule, which bars a prisoner who has filed three previous frivolous or meritless suits from proceeding *in forma pauperis* in subsequent suits. *See Wilson v. Yaklich,* 148 F.3d 596, 602 (6th Cir. 1998).

Further rebutting the claim that total exhaustion spares district courts from determining which claims are exhausted and which are unexhausted, the Second Circuit has noted that prisoners' suits often present challenging exhaustion questions that must be resolved at the outset of the litigation, regardless of whether the court ultimately applies a total or a partial exhaustion rule. In such situations, "the district court must first familiarize itself with the case and hear the positions of the parties in order to decide the exhaustion issue as a preliminary matter." *Ortiz,* 380 F.3d at 659. Once the district court has expended time determining whether claims have been exhausted "[i]t hardly seems to aid efficiency to require that ... it must dismiss any remaining exhausted claims only to allow the same case, absent the unexhausted claims, to be reinstituted, heard again on the exhausted issues, and then decided." *Id.* Once again, partial exhaustion is the more efficient approach.

Additionally, the majority's comparison of prisoner civil rights litigation to habeas corpus is completely inappropriate in light of clear Supreme Court precedent. Whereas habeas exhaustion "is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," no such parallel exists in the PLRA context. *Rose,* 455 U.S. at 518, 102 S.Ct. 1198; *see also Preiser v. Rodriguez,* 411 U.S. 475, 491, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) ("The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity."). The Supreme Court has repeatedly contrasted and distinguished habeas actions from § 1983 actions, very recently noting that "habeas corpus actions require a petitioner fully to exhaust state remedies which § 1983 does not." *See Wilkinson v. Dotson,* --- U.S. ----, ----, 125 S.Ct. 1242, 1246, 161 L.Ed.2d 253 (2005) (citing *Preiser v. Rodriguez,* 411 U.S. 475, 490-91, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); *Patsy v. Bd. of Regents,* 457 U.S. 496, 507, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982)); *see also Edwards v. Balisok,* 520 U.S. 641, 649, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997); *Heck v. Humphrey,* 512 U.S. 477, 480-81, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). In *Wilkinson,* the Court found that unlike habeas, which has clear comity concerns that require a petitioner to press his or her claims in state court, in § 1983 suits "the competing need to vindicate federal rights without exhaustion" allows "prisoners [to] bring their claims without fully exhausting state-court remedies." *Id.* The Court also noted the PLRA's general requirement that state administrative remedies be exhausted, however, it is clear from

Wilkinson's discussion of § 1983 and habeas that these two types of actions are inherently different. *Id.* at 1246-49 (discussing line of cases from *Preiser* to *Edwards* in which the Court distinguished habeas actions from § 1983 suits). The majority's attempt to draw parallels between the PLRA and habeas is entirely misplaced and completely unsupportable under clear Supreme Court precedent.[2]

Furthermore, unlike the state courts that review habeas petitions, "prison administrators generally limit their review to determining whether prison policy has been violated." *Jenkins,* 32 F.Supp.2d at 959 (quoted in *Ortiz,* 380 F.3d at 660). Prison officials are not equipped to review complex legal claims, and unlike state court proceedings, prison administrative review of grievances is not conducted under the rules of evidence or other judicial procedures "employed by courts of law in an attempt to assure accurate fact-finding." *Ortiz,* 380 F.3d at 660. For those reasons, prison administrative proceedings are highly unlikely to create the sort of complete factual record contemplated by the majority. One need not look any further than the record in this case: the individual issues that Jones-Bey fully grieved with prison officials do not present a better administrative record than the ones that he

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[2] Notwithstanding my belief that habeas exhaustion provides an extremely poor analogy to PLRA exhaustion, it should be noted that in another recently decided case, the Supreme Court modified the total exhaustion rule of *Rose v. Lundy* to hold that when confronted with a "mixed" habeas petition, a federal district court has limited discretion to stay the petitioner's exhausted claims while he or she exhausts the unexhausted claims in state court. *See Rhines v. Weber,* --- U.S. ----, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005).

only grieved through step one; for each fully grieved complaint, the record of step three review merely consists of brief, conclusory statements indicating that the review at steps one and two adequately addressed the problem, and that prison policy had not been violated and/or Jones-Bey did not presented a grievable claim. These statements have been entirely unhelpful in reviewing this case, and in no way are they comparable to a state court decision.

The majority's flimsy comparison of habeas and prisoner civil rights litigation is also dubious when one considers that habeas petitions "are usually about a singular event the petitioner's conviction in state court." *Ortiz,* 380 F.3d at 661. By contrast, prisoner civil rights suits "routinely seek to address more than one grievance sometimes a laundry list of grievances relating to different events or circumstances." *Id.; see also Jenkins,* 32 F.Supp.2d at 959 (noting that the prisoner-plaintiff's claims "range from allegations of general discrimination against black Jewish prisoners to improper handling of his food"). In the instant case, for example, Jones-Bey claims that Defendant Johnson repeatedly retaliated against him for exercising his First Amendment rights, and on one occasion used excessive force against him in violation of the Eighth Amendment; however, Jones-Bey also has an unrelated claim alleging that Defendant Trierweiler mishandled some of his grievances. The claims against Johnson and Trierweiler are not about a singular event, or a related series of events, and the majority has not presented any compelling reason to explain why the failure to exhaust the claims against Johnson requires the dismissal of the

exhausted claim against Trierweiler.

Finally, I disagree with the majority's conclusion that total exhaustion is not unduly punitive because prisoners may still proceed *in forma pauperis*. Title 28 U.S.C. § 1915(b)(1) requires prisoners filing *in forma pauperis* to "pay the full amount of a filing fee" to refile exhausted claims; thus, despite the possibility of proceeding *in forma pauperis*, requiring the prisoner to refile may still "'amount to nothing more than a monetary penalty against the prisoner.'" *Blackmon v. Crawford*, 305 F.Supp.2d 1174, 1180 (D.Nev. 2004) (quoting *Scott v. Gardner*, 287 F.Supp.2d 477, 488 (S.D.N.Y. 2003)); *see also Jenkins*, 32 F.Supp.2d at 959. "Although additional filing fees may prove a disincentive from bringing a mixed petition in theory," it is likely that "such incentives will have little effect because many prisoners do not understand the exhaustion rule in the first place." *Blackmon*, 305 F.Supp.2d at 1180. Further, the majority's suggestion that prisoners engage in a conscious cost-benefit analysis or "choice" of when to bring exhausted claims is belied by the fact that many, if not most, *pro se* prisoners have little or no education, resources or understanding of complex legal principles such as the exhaustion of administrative remedies. *Cf. id.* (noting that "*pro se* prisoners cannot be held to understand the consequences of the 'total exhaustion' rule when the federal courts are so widely split on whether or not it even applies"). In practice, the total exhaustion rule is not only likely to amount to a monetary penalty, it is also likely to be a convenient means for district courts to expediently close the courthouse door to

pro se prisoner litigants, without proper regard for the merits of their claims or consideration of their status. *See Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting *Haines v. Kerner,* 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)) ("[A] pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers.'"); *Burton v. Jones,* 321 F.3d 569, (6th Cir. 2003) ("A handwritten pro se complaint should be liberally construed."); FED. R. CIV. P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").

Because the total exhaustion rule directly conflicts with our prior, published opinion in *Hartsfield,* I respectfully dissent from the majority's failed attempt to adopt such a rule. Moreover, the total exhaustion rule is ill-advised, and it fails to serve the efficiency purposes behind the PLRA as well the partial exhaustion rule. However, because Jones-Bey failed to exhaust his administrative remedies relating to the First Amendment retaliation claim against Defendant Johnson, I agree with the majority that the claim should be dismissed without prejudice.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LAMAR JONES BEY,

Plaintiff,

v.

Case No. 2:02-cv-101
Honorable Robert Holmes Bell

KELLY JOHNSON, et al.,

Defendants.
_____/

JUDGMENT

In accordance with the Opinion and Order entered this date,

IT IS HEREBY ORDERED that defendant's motion for summary judgment (Docket #23) is granted dismissing this case in its entirety. IT IS FURTHER ORDERED that plaintiff's motion for a temporary restraining order and preliminary injunction (Docket #42) and motion reconsideration (Docket #56) are denied.

APPROVED FOR E-FILING:

Date: September 16, 2003

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LAMAR JONES BEY,

Plaintiff, Case No. 2:02-cv-101
Honorable Robert Holmes Bell

v.

KELLY JOHNSON, et al.,

Defendants.
_____/

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on August 18, 2003. The Report and Recommendation was duly served on the parties. The Court has received objections from the plaintiff. In accordance with the 28 U.S.C. § 636(b)(1), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

Plaintiff argues in his objections that he exhausted his grievance remedies. However it is not clear to the court

that plaintiff exhausted his grievance remedies on each claim that he presented in his complaint. Plaintiff's complaint is properly dismissed for failure to exhaust grievance remedies.

Moreover, plaintiff's claims fail on the merits. Plaintiff alleges that defendant Johnson retaliated against him. However, plaintiff has failed to show that defendant Johnson was involved in the allegedly retaliatory acts. Similarly, plaintiff's claims of verbal abuse fail to support an Eighth Amendment claim. Further, plaintiff's claim that handcuffs were placed on his hands too tightly fails to support an Eighth Amendment claim. An x-ray revealed only minor swelling and no treatment was required. Moreover, for the reasons stated in the report defendants are entitled to qualified immunity from liability. Further, plaintiff's claim for equitable relief is properly denied.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court.

IT IS FURTHER ORDERED that plaintiff's motion for reconsideration (Docket #56) is denied.

The court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). See McGore v. Wrigglesworth, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the court grants defendants' motion for summary judgment, the court discerns no good-faith basis for an appeal. Should the plaintiff appeal this decision, the court will assess the $105 appellate filing fee pursuant to § 1915(b)(1), see McGore, 114 F.3d at 610-11, unless

plaintiff is barred from proceeding in forma pauperis, e.g. by the "three-strikes" rule of § 1915(g). If he is barred, he will be required to pay the $105 appellate filing fee in one lump sum.

APPROVED FOR E-FILING:

Date: September 16, 2003

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LAMAR JONES BEY,

Plaintiff, Case No. 2:02-cv-101
HON. ROBERT HOLMES
v. BELL

KELLY JOHNSON, et al.,

Defendants.
_____/

REPORT AND RECOMMENDATION

Plaintiff Lamar Jones Bey, an inmate at the Alger Maximum Correctional Facility (LMF), filed this pro se civil rights action pursuant to 42 U.S.C. § 1983 against defendants Kelly Johnson and Wayne Trierweiler. Plaintiff alleged that on October 7, 2001, defendant Johnson arbitrarily took away plaintiff's yard time without explanation. Plaintiff filed a grievance on issue. Defendant Johnson allegedly came to plaintiff's cell on November 4, 2001, and stated "you like to write grievances, huh? You know me and the counselor are related, I'm going to see if I can have him put some pressure on you to break you up from that habit." On November 9, 2001, defendant Johnson shook down

plaintiff's cell while plaintiff was in the segregation yard. Defendant Johnson allegedly desecrated several Islamic religious books. Defendant Johnson told plaintiff that "we don't like Niggers or Muslims up here" and that she moved from Indiana because she did not like Niggers.

On December 13, 2001, defendant Johnson placed handcuffs too tightly on plaintiff's wrist, allegedly causing the loss of blood circulation. Johnson then allegedly pulled on the handcuffs which caused plaintiff to strike the food slot, resulting in swelling and pain to plaintiff's wrists. Plaintiff alleges that defendant Johnson deliberately falsified a misconduct report for assault and battery to cover up her actions. On December 17, 2001, plaintiff was seen by a nurse for bruising from the alleged assault. An x-ray was taken of his wrist. Plaintiff was found not guilty of the misconduct by January 8, 2002. Defendant Johnson told plaintiff "You're dead! And I'm still going to get your ticket free time!" On January 20, 2002, defendant Johnson told plaintiff that she would show him who has the power. On February 11, 2002, defendant Johnson cam to plaintiff's cell and said "you're outta there!" On February 21, 2002, RUO Zimmerman shook down plaintiff's cell and confiscated legal papers. On April 21, 2002, plaintiff alleges that defendant Johnson stepped in front of his cell and stated: "Asshole, I'm still going to get your Nigger ass!"

Plaintiff attempted to file a grievance against defendant Johnson on November 10, 2001. Defendant Trierweiler rejected the grievance concluding "it was not clear and concise and contains extraneous information, unnecessary

and confusing information." Trierweiler rejected a second grievance on December 18, 2001, stating that the issue was already grieved. A third grievance was rejected on December 20, 2001, when Trieweiler stated the issue presented was non-grievable because it related to a major misconduct. Another of plaintiff's grievances was rejected on January 24, 2002, because it related to a misconduct ticket. On January 16, 2002, classification director Schroader denied plaintiff's grievance for staff corruption against defendant Trierweiler, concluding that Trierweiler rejected grievances in accordance with policy. Warden Bouchard denied the grievance at Step II. The grievance was denied at Step III.

Plaintiff alleges that defendant Johnson violated his Eight Amendment rights by assaulting plaintiff on December 13, 2001, and by calling plaintiff names. Plaintiff all asserts an assault and battery claim against defendant Johnson. Plaintiff alleges that defendant Johnson retaliated against him by taking his yard time away on October 7, 2001, threatened him for writing a grievance, caused his cell to be searched, and had Islamic books desecrated. Plaintiff further alleges that defendant Johnson falsified a major misconduct for assault and battery and made numerous threats. Plaintiff asserts that he has the right to be free from ethnic intimidation from defendant Johnson. Plaintiff complains that defendant Trierweiler interfered with plaintiff's right to file grievances by rejecting plaintiff's grievances. Defendants have moved for summary judgment.

Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(f); Celotex Corp. v. Catrett, 477 U.S. 317, 322 – 323 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. Id. at 324 – 25. The nonmoving part cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." Id. at 324 (quoting Fed. R. Civ. P. 56(e)). While the evidence must be viewed in the light most favorable to the nonmoving part, a mere scintilla of evidence in support of the nonmovant's position will be insufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 – 52 (1986). Ultimately, the court must determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." Id. at 252. See also Leahy v. Trans Jones, Inc., 996 F.2d 136, 139 (6th Cir. 1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); cf. Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1448 (6th Cir. 1993) (single affidavit concerning state of mind created factual issue).

Defendants argue that plaintiff has failed to show that he exhausted his grievance remedies on each of his claims. Pursuant to 42 U.S.C. § 1997e(a), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must exhaust administrative remedies. See Porter v.

Nussle, 534 U.S. 516, 122 S. Ct. 983 (2002); Booth v. Churner, 532 U.S. 731 (2001). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. See Porter, 122 S. Ct. at 988; Booth, 532 U.S. at 741; Knuckles El. v. Toombs, 215 F.3d 640, 642 (6th Cir.), cert. denied, 531 U.S. 1040 (2000); Freeman v. Francis, 196 F.3d 641, 643 (6th Cir. 1999). A district court must enforce the exhaustion requirement sua sponte. Brown v. Toombs, 139 F.3d 1101, 1104 (6th Cir.), cert. denied, 525 U.S. 833 (1998); accord Wyatt v. Leonard, 193 F.3d 876, 879 (6th Cir. 1999).

It is clear that plaintiff has exhausted some of his grievance remedies on some of his claims. However, it is not clear from the record that plaintiff exhausted his grievance remedies on every claim that he presented in his complaint. Because Plaintiff has failed to establish that he exhausted every claim asserted against the named Defenadnts, the Court should dismiss his action pursuant to the "total exhaustion" rule. Under the total exhaustion rule, the presence of an unexhausted claim results in the dismissal of the entire action. Currently, a split exists in this District concerning the validity of the "total exhaustion" interpretation of 42 U.S.C. § 1997e(a). Smeltzer v. Hook, 235 F. Supp. 2d 736 (W.D. Mich. 2002) (applying total exhaustion rule) (comparing Keenan v. Twommy, No. 1:97-cv-549 (W.D. Mich. July 29, 1999) (applying total exhaustion rule) with Jenkins v. Toombs, 32 F. Supp. 2d 955 (W.D. Mich. 1999) (rejecting total exhaustion rule). In Knuckles El. v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000), cert. denied 531 U.S. 1040, 121 S.

Ct. 635 (2000), the Sixth Circuit "reserve[d] to another day the question of whether 'exhausted claims' in a 'mixed complaint' should be addressed when such claims would otherwise meet the pleading requirement or whether such claims should be dismissed in their entirety."

In Smeltzer, the court noted that the majority of courts that have addressed this issue have applied the total exhaustion rule. 235 F. Supp. 2d at 743. In addition, the court noted that the total exhaustion rule is supported both by the plain meaning of 42 U.S.C. § 1997e(a) and strong policy interests. Smeltzer, 235 F. Supp. 2d at 743. Section 1997e(a) provides, "No *action* shall be brought with respect to prison conditions under section 1983 of this title . . . until such administrative remedies as are available are exhausted." 28 U.S.C. § 1997e(a). As noted in Smeltzer, Congress indicated that a prisoner is required to exhaust all claims before his action may proceed by using the word "action" instead of "claim." Smeltzer, 235 F. Supp. 2d at 744.

As noted by the court in Smeltzer, if Congress had intended to permit the piecemeal adjudication of claims relating to prison conditions, the statute would have precluded the bringing of unexhausted *claims*, rather than *actions*. 235 F. Supp. 2d at 744 (emphasis in original). Section 1997e(c)(1) provides that the district court shall dismiss any "action" which is frivolous, malicious, or fails to state a claim. In contract, § 1997e(c)(2) provides that the district court may dismiss a "claim" which is frivolous, malicious or fails to state claim without first requiring exhaustion of administrative remedies. It is apparent that

Congress realized that requiring dismissal without prejudice under § 1997(a) might prevent a court from dismissing with prejudice for frivolousness or failure to state a claim. Therefore Section 1997e(c)(2) serves to reconcile § 1997(a) and § 1997(e)(1) by permitting a court to dismiss an unexhausted claim as frivolous, thus preventing an unexhausted claim from "holding up" the dismissal of a frivolous action comprising otherwise exhausted claims." Smeltzer, 235 F. Supp. 2d at 744.

In Smeltzer, the court noted that the general intent of the PLRA and other strong policy arguments offer additional support for a total exhaustion rule. As noted by the Eleventh Circuit, Congress amended § 1997e(a) largely in response to concerns about the heavy volume of frivolous prison litigation in the federal courts. Smeltzer, 235 F. Supp. 2d at 744 (citing Alexander v. Hawk, 159 F. 3d 1321, 1326 n.11 (11th Cir. 1998) (citing 141 Cong. Rec. H14078-02, *H14105 (daily ed. Dec. 6, 1995)). "Congress desired 'to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners.'" Id. (quoting 141 Cong. Rec. S14408-01. *S14418 (daily ed. Sept. 27, 1995)).

The total exhaustion rule advances the goals of the PLRA by discouraging frivolous prisoner litigation and conserving judicial resources. Smeltzer, 235 F. Supp. 2d at 744-45. If only the unexhausted claims were dismissed from a mixed complaint, there is nothing to deter prisoners from raising unexhausted claims indiscriminately.

Moreover, the assessment of a second filing fee after the prisoner has properly exhausted all of his claims also serves as a deterrent against filing unexhausted or frivolous claims. Smelzter, 235 F. Supp. 2d at 745.

In addition, the court in Smeltzer held that application of a total exhaustion rule in the civil rights context promotes comity in much the same way as in the habeas corpus context, where the total exhaustion rule is clearly established. 235 F. Supp. 2d at 745. Regarding the amendments by the PLRA to § 1997e(a), the Smeltzer court quoted Brown v. Toombs, 129 F.3d at 1103, as follows:

> The new statute has extensive benefits. It recognizes that it is difficult to explain why we require full exhaustion in habeas corpus cases involving life and liberty, but allow direct access in prison cases under § 1983. As Justice Stewart stated in Preiser v. Rodriguez, 411 U.S. 475, 491-492, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973):
>
> > Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being bypassed in the correction of these problems. Moreover, because most potential litigation involving state prisoners arises on a day to day basis, it is most efficient to and properly handled by the state administrative bodies and the state courts, which are for the most part, familiar with the grievances of state prisoners and in a better physical and

> practical position to deal with these grievances.

Smeltzer, 235 F. Supp. 2d at 745.

As concluded by the court in Smeltzer, the principles of comity require that prison officials have a full opportunity to address claims raised by prisoners before they are brought to federal court. "By requiring total exhaustion, the federal courts not only with promote comity, but also will reap the benefits of 'more focused complaints and more developed evidentiary records.'" Smeltzer, 235 F. Supp. 2d at 745 (citing Rivera v. Whitman, 161 F. Supp. 2d 337, 343 (D.N.J. 2001).

Moreover, in Storey v. Hutchinson, 56 Fed. Appx. 228 (6th Cir. 2003), the Sixth Circuit recently affirmed the dismissal of a prisoner civil rights complaint for lack of complete exhaustion of remedies. 56 Fed. Appx. at 229. In Storey, the Plaintiff had submitted affidavits that no grievance procedure was available to him, but later recanted and filed documents showing that he had exhausted his available remedies as to some of the many claims he raised. The district court dismissed the suit pursuant to 42 U.S.C. § 1997e because of Plaintiff's failure to show that he had exhausted all available administrative remedies. Id. In affirming the dismissal, the court stated that the PLRA requires a prisoner to exhaust all available administrative remedies before filing a civil rights action in federal court, and that when a prisoner fails to exhaust his administrative remedies before filing his compliant, or only partially exhausts his remedies, dismissal of the complaint is appropriate. Id.

Plaintiff's complaint contains exhausted claims and unexhausted claims.[1] It is recommended that the Court find that plaintiff has failed to exhaust his administrative remedies as required by § 1997e(a).[2] Dismissal of this action without prejudice is appropriate when a prisoner has failed to show that he exhausted available administrative remedies. See Freeman, 196 F.3d at 645; Brown, 139 F.3d at 1104; White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997).

Defendant Johnson argues that plaintiff's retaliation claim should be dismissed. Retaliation based upon a prisoner's exercise of his or her constitutional rights violates the Constitution. See Thaddeus-X v. Blatter, 175 F.3d 378, 394 *1037 (6th Cir. 1999) (en banc). In order to set forth a First Amendment retaliation claim, a plaintiff must establish that: (1) he was engaged in protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, in least in part, by the protected conduct. Thaddeus-X, 175 F.3d at 394. Moreover, Plaintiff must be able to prove that

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[1] Plaintiff incorrectly argues that defendants can waive his requirement to exhaust grievance remedies by not asserting each failure to exhaust as an affirmative defense.

[2] It is not clear whether Plaintiff may still grieve his claims. Under the policy of the prison, complaints must be resolved expeditiously, and complaints may be rejected as untimely. See Policy Directive 03.02.130, ¶¶ G-3, T, V. The Sixth Circuit held that an inmate cannot claim that "he has exhausted his remedies or that it is futile to do so because his grievance is now time-barred under the regulations." Hartsfield, 199 F.3d at 309 (citing Wright v. Morris, 111 F.3d 414, 417 n.3 (6th Cir.), cert. denied, 522 U.S. 906 (1997)).

the exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct. See Smith v. Campbell, 250 F.3d 1032, 1037 (6th Cir. 2001) (citing Mount Healthy City Sch. Bd. of Educ. V. Doyle, 429 U.S. 274, 287 (1997)).

Plaintiff has alleged that after he filed a grievance against defendant Johnson for refusing to call him out for yard time, defendant Johnson caused plaintiff's cell to be searched and called plaintiff racially derogatory names. Plaintiff argues that defendant Johnson's conduct was in retaliation for his grievance. Retaliation based upon a prisoner's exercise of his or her constitutional rights violates the Constitution. See Thaddeus-X v. Blatter, 175 F.3d 378, 394 *1037 (6th Cir. 1999) (en banc).

The filing of a prison grievance is a constitutionally-protected conduct for which a prisoner cannot be retaliated against. See Smith v. Campbell, 250 F. 3d 1032, 1037 (6th Cir. 2001); Hally v. Nusholtz, No. 99-2442, 2000 WL 1679458, at *2 (6th Cir. Nov. 1, 2000); Burton v. Rowley, No 00-1144, 2000 WL 1679463, at *2 (6th Cir. Nov. 1, 2000). Plaintiff, however, has failed to show that defendant Johnson was involved in an improper cell search or that she desecrated his religious property. There exists no evidentiary support for plaintiff's claim. Accordingly, in the opinion of the undersigned, plaintiff has failed to show that any adverse action was taken against him by defendant Johnson. Moreover, plaintiff has failed to show that any of defendant Johnson's conduct was related to plaintiff's grievance.

Similarly, plaintiff's claim of verbal abuse and name calling fails to state a claim. Allegation of verbal harassment or threats by prison officials toward an inmate do not constitute punishment within the meaning of the Eighth Amendment. Ivey v. Wilson, 832 F.2d 950, 955 (6th Cir. 1987). Nor do allegations of verbal harassment rise to the level of unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. Id. Even the occasional or sporadic use of racial slurs, although unprofessional and reprehensible, does not rise to a level of constitutional magnitude. See Torres v. Oakland County, 758 F.2d 147, 152 (6th Cir. 1985).

The use of harassing or degrading language by a prison official, although unprofessional and deplorable, does not rise to constitutional dimension. See Ivey v. Wilson, 832 F.2d 950, 954-55 (6th Cir. 1987); see also Thaddeus-X v. Langley, No. 96-1282, 1997 WL 205604, at *1 (6th Cir. Apr. 24, 1997) (verbal harassment insufficient to state a claim) Murray v. United States Bureau of Prisons, No. 95-5204, 1997 WL 34677, at *3 (6th Cir. Jan. 28, 1997) ("The magistrate judge correctly held that verbal abuse cannot state an Eighth Amendment claim" and "[a]lthough we do not conduct the alleged statements, the Eighth Amendment does not afford us the power to correct every action, statement or attitude of a prison official with which we might disagree."); Clark v. Turner, No. 96-3265, 1996 WL 721798, at *2 (6th Cir. Dec. 13, 1996) ("Verbal harassment and idle threats are generally not sufficient to constitute an invasion of an inmate's constitutional rights."); Hampton v. Alexander, 1996 WL 40237, at * 1 (same) (citing Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987)

and Patton v. Przybylski, 822 F.2d 697, 700 (7th Cir. 1987); Wynn v. Wolf, No. 93-2411, 1994 WL 105907, at * 1 (6th Cir. March 28, 1994) (allegation that defendants used insulting racial slurs towards plaintiff was insufficient to support a constitutional claim); Brown v. Toombs, No. 92-1756, 1993 WL 11882 (6th Cir. Jan. 21, 1993) ("Brown's allegation that a corrections officer used derogatory language and insulting racial epithets is insufficient to support his claim under the Eighth Amendment.").

Further, the alleged use of racial slurs does not rise to the level of a constitutional violation. Defendant's conduct, if true, is deplorable. Although harassment and verbal abuse is not condoned by the courts and should not be tolerated by correctional authorities, allegations regarding this type of abuse do not present a constitutional violation. Ivey v. Wilson, 832 F.2d 950, 954 (6th Cir. 1987); Hartsfield v. Mayer, No. 95-1411, 1996 WL 43541, at *2 (6th Cir. Feb. 1, 1996); Green v. Hill, No. 94-1851, 1995 WL 764119 at *1 (6th Cir. Dec. 27, 1995). The use of insulting racial slurs is also insufficient to support a constitutional claim. Wynn v. Wolf, No. 93-2411, 1994 WL 105907, at * 1 (6th Cir. March 28, 1994); Brown v. Toombs, No. 92-1756, 1993 WL 11882 (6th Cir. Jan. 21, 1993).

Defendant's Trierweiler's only involvement was responding to plaintiff's grievances. Defendant Trierweiler was not involved in any of the alleged improper conduct that involved the grievances. Rather, plaintiff complains about the manner in which defendant Trierweiler was

involving in processing the grievance responses. However, there exists no constitutional right to an effective prison grievance procedure. Overholt v. Unibase Data Entry, Inc., 2000 WL 799760 (6th Cir. June 14, 2000), citing Flick v. Alba, 932 F.2d 728, 729 (8th Cir. 1991). Defendant Trierweiler was not involved in any of the alleged violations of plaintiff's constitutional rights. Accordingly, plaintiff cannot support a claim against defendant Trierweiler.

Plaintiff claims that defendant Johnson violated his Eighth Amendment rights by placing handcuffs too tightly on plaintiff's wrists. Every malevolent tough by a prison guard does not give rise to a Eighth Amendment cause of action, see Hudson v. McMillian, 503 U.S. 1, 9 (1992), and the prisoner must allege that he sustained more than de minimis injury in order to state a viable excessive force claim. See id. at 9-10; Thaddeus-X v. Blatter, 175 F.3d 378, 402 (6th Cir. 1999) (en banc). See Benson v. Carlton, No. 99-6433, 2000 WL 1175609, at *1 (6th Cir. Aug. 9, 2000) (whirling sensation in prisoner's head after fear of guard caused him to skip supper constituted de minimis injury and did not support claim for mental or emotional suffering under the Eighth Amendment); Scott v. Churchill, No. 97-2061, 2000 WL 519148, at *2 (6th Cir. April 6, 2000) (plaintiff's claim that guard grabbed his neck and threatened him did not rise to the level of an Eighth Amendment violation). Plaintiff alleges that defendant Johnson placed the handcuffs too tightly on his wrists, and pulled the handcuffs causing plaintiff to strike the food slot. Plaintiff alleges that he suffered with numbness and swelling which required medical treatment. However,

plaintiff did receive an x-ray, but only minor swelling was noted and plaintiff received no treatment. Plaintiff has failed to show that he suffered any actionable physical injury from the incident that required medical attention. Furthermore, in the opinion of the undersigned, because Plaintiff fails to allege or show more than a de minimis physical injury, his Eighth Amendment claim for mental anguish is barred by 42 U.S.C. § 1997e(e), which precludes any claim by a prisoner "for mental or emotional injury suffered while in custody without a prior showing of physical injury." See Perkins v. Kansas Dep't of Corr., 265 F.3d 803, 807 (10th Cir. 1999); Gomez v. Chandler, 163 F.3d 921, 924 (5th Cir. 1999); Zehner v. Trigg, 133 F.3d 459, 461 (7th Cir. 1997); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997); Oliver v. Sundquist, No. 00-6372, 2001 WL 669994, at *1 (6th Cir. June 7, 2001); Siller v. Dean, No. 99-5323, 2000 WL 145167, at *2 (6th Cir. Feb. 1, 2000).

Defendants also assert entitlement to the defense of qualified immunity. Government officials, performing discretionary functions, are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Dietrich v. Burrows, 167 F.3d 1008, 1012 (6th Cir. 1999); Turner v. Scott, 119 F.3d 425, 429 (6th Cir. 1997); Noble v. Schmitt, 87 F.3d 157, 160 (6th Cir. 1996); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). An "objective reasonableness" test is used to determine whether the official could reasonably have believed his conduct was lawful. Dietrich, 167 F.3d at 1012; Anderson v. Creighton, 483 U.S. 635, 641 (1987).

"The procedure for evaluating claims of qualified immunity is tripartite: First, we determine whether a constitutional violation occurred; second, we determine whether the right that was violated was a clearly established right of which a reasonable person would have known; finally, we determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." Williams v. Mehra, 186 F.3d 685, 690 (6th Cir. 1999). For the reasons stated defendants are entitled to qualified immunity.

Finally, to the extent that plaintiff is claiming his state law rights were violated, it is recommended that this court refuse to exercise pendent jurisdiction over such claims. Claims raising issues of state law are best left to determination by the state courts, particularly in the area of prison administration. In addition, pendent jurisdiction over state law claims cannot be exercised after all federal claims have been dismissed. United Mine Workers v. Gibbs, 715, 726-727 (1966); Smith v. Freland, 954 F.2d 343, 348 (6th Cir.), cert. denied, 504 U.S. 915 (1992).

Plaintiff moves for a temporary restraining order and preliminary injunction against defendant Johnson for continuing violations of plaintiff's constitutional rights by retaliating against plaintiff. The issuance of preliminary injunctive relief is committed to the discretion of the district court. Planned Parenthood Association v. City of Cincinnati, 822 F.2d 1390, 1393 (6th Cir. 1987). In

exercising that discretion, the court must consider and balance four factors:

1. Whether the movant has shown a strong or substantial likelihood or probability of success on the merits.

2. Whether the movant has shown irreparable injury.

3. Whether the preliminary injunction could harm third parties.

4. Whether the public interest would be served by issuing a preliminary injunction.

Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994). These factors are not prerequisites to the grant or denial of injunctive relief, but factors that must be carefully balanced by the district court in exercising its equitable powers. Id.

Moreover, where a prison inmate seeks an order enjoining state prison officials, this Court is required to proceed with the utmost care and must recognize the unique nature of the prison setting. See Kendrick v. Bland, 740 F.2d 432 at 438, n.3, (6th Cir. 1984). See also Harris v. Wilters, 596 F.2d 678 (5th Cir. 1979). It has also been remarked that a party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances. See Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir. 1969), cert. denied, 394 U.S. 999 (1969). See also O'Lone v. Estate of Shabazz, 482 U.S. 342 (1986).

Plaintiff's "initial burden" in demonstrating entitlement to preliminary injunctive relief is a showing of a strong or substantial likelihood of success on the merits of his Section 1983 action. NAACP v. City of Mansfield, Ohio, 866 F.2d 162, 167 (6th Cir. 1989). A review of the materials of record fails to establish a substantial likelihood of success with respect to plaintiff's claim that the defendants have violated his federal rights. Furthermore, plaintiff has failed to establish that he will suffer irreparable harm absent injunctive relief.

Finally, in the context of a motion impacting on matters of prison administration, the interests of identifiable third parties and the public at large weigh against the granting of an injunction. Any interference by the federal courts in the administration of state prison matters is necessarily disruptive. The public welfare therefore militates against the issuance of extraordinary relief in the prison context, absent a sufficient showing of a violation of constitutional rights. See Glover v. Johnson, 855 F.2d 277, 286-87 (6th Cir. 1988). That showing has not been made here.

Accordingly, it is recommended that defendants' motion for summary judgment (Docket #23) be granted dismissing plaintiff's complaint in its entirety. Alternatively, it is recommended that the complaint be dismissed without prejudice for failure to exhaust grievance remedies. It is further recommended that plaintiff's motion for a temporary restraining order and preliminary injunction (Docket #42) be denied.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and

filed with the Clerk of the Court within ten days of your receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR. 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal of those issues or claims addressed or resolved as a result of the Report and Recommendation. United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See also Thomas v. Arn, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

Dated: August 18, 2003

No. 03-2331
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAMAR JONES BEY,	)	FILED
Plaintiff-Appellant,	)	OCT 12 2005
	)	
v.	)	LEONARD GREEN,
KELLY JOHNSON, ET AL.,	)	Clerk
Defendants-Appellees.	)	
	)	ORDER

BEFORE: SILER and CLAY, Circuit Judges; and BERTELSMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.